IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

C.W.P. No.1206 of 2007

Judgment reserved on: 26.9.2007.

Date of decision: 8th October, 2007.

Shri Santokh Singh ....Petitioner

-Versus-

H.P.S.E.B. and another ….Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta,Judge.

The Hon'ble Mr.Justice V.K.Ahuja, Judge.

Whether approved for reporting? Yes

For the Petitioner: Mr.J.L. Bhardwaj, Advocate.

For Respondents: Mr.Shrawan Dogra, Advocate

Deepak Gupta, J.

This writ petition is directed against the order of the learned H.P. State Administrative Tribunal (For short Tribunal) dated 5.7.2007 in O.A. No.2484 of 2003 whereby the original application filed by the petitioner has been rejected.

The brief facts of the case are that the petitioner was appointed as Sub Station Attendant with the H.P. State Electricity Board (For short the Board). On 18.8.2003 the petitioner was working in Electrical Division, Gagret. The admitted facts are that the post of Sub Station Attendant in which the petitioner is working is a post where the cadre is maintained at the Circle level. According to the petitioner he could not have been posted out of the cadre. On 18.8.2003 the petitioner was posted from Electrical Division,

HPSEB, Gagret to Electrical Division, HPSEB, Kaza in Spiti. He challenged the transfer order by filing an Original Application No.2484 of 2003 before the learned Tribunal and the main ground of attack was that he could not have been transferred outside his circle. The stand of the respondent is that an employee can be transferred compulsorily to a post outside his cadre. This stand has found favour with the learned Tribunal which has dismissed the original application. Hence, this petition.

We have heard Sh.J.L.Bhardwaj, learned counsel for the petitioner and Shri Shrawan Dogra, learned counsel for the Board. The only question which needs to be decided in the present case is as to whether an employee can be posted out of his cadre and if so under what circumstances.

The petitioner in support of his claim has relied upon an office memorandum issued by the Board which reads as follows:

> "HIMACHAL PRADESH STATE ELECTRICITY BOARD.
>
> "OFFICE MEMORANDUM"
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> Consequent upon the notification of the Recruitment and Promotion regulations of the Technical Posts (Field), the staff borne on a particular Divisional/Circle Level cadre are not liable to be transferred to another Divisional/Circle level cadre. The case as to how the seniority of such technical staff (Field) who approach for transfer to the places of their choice under another Divisional/Circle cadre is to be determined was under consideration of the Board.
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> The Himachal Pradesh State Electy. Board after careful consideration is pleased to decide that the transfer of the technical staff (field) borne on Divisional/circle level cadre may be ordered by the competent authority subject to their losing seniority in the Division/Circle from which they are transferred. Their Seniority is to be dovetailed at the end of the seniority list of their corresponding cadre of Division/Circle to which they are transferred.

A note to this effect may also be made in the transfer orders.

sd/-

Secretary,
H.P. State Electy. Board,
Shimla-4.
No.HPSEB (SECTT)/106-II/76-2959-3034 Dated:19.1.76."

A perusal of the aforesaid memorandum clearly indicates that the technical posts in the field are to be borne on the circle level cadre and an employee holding such a post is not liable to be transferred to another Division/Circle. Even if an employee himself requests for such transfer, the transfer will only be ordered subject to the condition that he will loose his seniority in his parent cadre.

On the other hand the respondents have relied on a decision of the Government of India under Article 26 of the Civil Services Regulations, relevant portion of which reads as under:

"(3)**Compulsory transfer outside the cadre---**A question has been raised whether a Central Government servant may be transferred compulsorily to a post outside the cadre of his own department or service. The question has two aspects, namely—

(a)Whether such transfers can be made without the officer's consent and;

(b)in so, in what circumstances they should or should not be made.

The object of this Office Memorandum is to clarify the legal position and to indicate the general consideration to be borne in mind in dealing with individual cases.

2.Fundamental Rule 11 declares that unless in any case it is otherwise distinctly provided, the whole time of a Government servant is at the disposal of the Government which pays him and he may be employed in any manner required by proper authority without claim or additional remuneration whether the services required of him are such as would ordinarily be remunerated from the Consolidated Fund, or from a Local Fund. Under F.R. 110, a Government servant's transfer to "foreign service" cannot be effected against his will. That restriction does not, however, apply to transfer of a Government servant from one post under Government to another which is permissible under F.R. 15. this rule clearly contemplates that transfer may be to any post within or outside

the parent department or service and also that the appointment to the new post may be of any description, e.g., temporary, officiating, substantive, etc. The only restriction laid down is that save in the circumstances specified in the rule, the transfer shall not be made to post carrying less pay than the pay of the permanent post on which the Government servant holds an actual or suspended lien. If the transfer is at the officer's own request or on account of inefficiency or misbehaviour, even a reduction in pay is permissible. This will, of course, be subject to the safeguards laid down in the Constitution, and the disciplinary rules applicable to officer. Fundamental Rule 15, read with Fundamental Rule 12-A, make it clear that a substantive transfer from a permanent post in any service or department to a permanent post in any other service or department can be so made as, to abolish the lien on the original post and to create a lien on the new post. In other words, even a permanent transfer from one service or department to another service or department can be made irrespective of the wishes of the Government servant concerned.

It is evidently in the public interest that in order to bring about all round national development, Government should be free to utilize the available man-power to the best advantage. The Ministries etc. area, therefore, advised to examine whether in the recruitment rules or terms of service governing the department cadres, with which they are concerned, there is anything which hampers this freedom and if so, whether any amendments of the rule, etc., can be made.

3.On the other hand, though the power to make such transfer is available, it should be exercised in the public interest and with due care. The following general consideration would have to borne in mind:-

(i)The best utilization of available man-power does not necessarily require permanent transfers. But even if services of an officer are needed in a post outside the parent service or department it is usually sufficient to arrange for his deputation for a limited period.

(ii)Organized separate services for dealing with the needs of different branches of administration provide a steady supply of officers with specialized training and graduated experience who have a sense of departmental loyalty and reasonable assured prospects. Compulsory permanent transfer to and from such services should only be made in cases of proved necessity.

(iii)Other things being equal, the State will get better service from a willing servant than from one who is compelled to carry

> out the duties of a post against his wishes. So long as the reluctance of an officer is not based on unreasonable or unworthy considerations, public interest would generally be better served by taking some one who is not so reluctant.
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> (iv)While the public interest is served, the legitimate claims and expectations of individual employees should not be ignored. It is necessary to make sure, not only, that there is no loss of pay but also that the employee's reasonable expectations in the original service or department are preserved, or equal prospects are provided in the service or department to which the employee is transferred. At the same time, the interest of members of the service or Department to which the transfers are made should also be considered.
>
> (v)A transfer to a distant place involves movement not only of the officer concerned but also his dependents. This may well be a serious hardship, especially to the low paid employees."

There can be no manner of doubt that an employer has the right to transfer his employee anywhere. However, there are some well recognized principles and one is that normally an employee is not to be posted out of his cadre. In fact the decision of the Government of India quoted above and relied by the respondent Board itself clearly envisages that the transfer of an employee especially a low paid employee to a distant place involves not only movement of the employee but also his dependents. The Board itself has issued a memorandum stating that technical employees in the field shall not be posted outside their Division or cadre. It may be true that an employee has no right to claim that he cannot under any circumstances be posted out of his cadre. Numerous examples can be given where the employer may be justified in transferring an employee outside his circle. There may be cases where the work in the circle decreases and the employees are rendered surplus and

therefore the employer is compelled to transfer an employee outside the circle. There may also be cases where in a particular circle there is a great shortage of employees and therefore it becomes necessary to move some employees from some other circles to the circle where there is shortage of employees. However, these are not ordinary situations and these are extraordinary situation.

It has also been contended on behalf of the Board that the decision where an employee is to be shifted or transferred out of his circle is a decision to be taken by the Board and this Court cannot substitute its views for the views of the employer.

The Apex Court in **National Hydroelectric Power Corp. Ltd. Vs. Shri Bhagwan and another, (2001)8 SCC 574,** was dealing with a question with regard to transfer of an employee from corporate office to the field. The Apex Court held as follows:

> "5…….It is by now well settled and often reiterated by this Court that no government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise of power or stated to be in violation of statutory provisions prohibiting any such transfer, the courts or the tribunals cannot interfere with such orders as a matter of routine, as though they are the appellate authorities substituting their own decision for that of the management, as against such orders passed in the interest of administrative exigencies of the service concerned. On the facts and circumstances of the cases before us, we are also unable to agree with the learned counsel for the respondents that Rule 4.1.1 of the Seniority Rules interdicts any transfer of the employees from one office or project or unit to any one of the other as long as the seniority of such an employee is

> protected based on the length of service with reference to the date of promotion or appointment to the grade concerned irrespective of the date of transfer……"

This view has been reiterated by the Apex Court in **Union of India and others vs. Janardhan Debanath and another, (2004)4 SCC 245 and State of U.P. and another vs. Siya Ram and another, (2004) 7 SCC 405.** Relying upon these observations Sh.Dogra has urged that the transfer outside the cadre is permissible and the Court should not interfere in the same.

A perusal of the law laid down by the Apex Court clearly shows that the Court can interfere where it finds that the transfer is malafide or is against the statutory provision. In the present case we have already noted the office memorandum issued by the Board itself which clearly indicates that the employees cannot be transferred to another Division/Circle. Despite this notification we are not taking the view that the hands of the employers are totally tied and it cannot under any circumstances transfer an employee from one circle to another. However, the employer must show what are the administrative exigencies which have weighed with it to exercise this power. Once the Board had decided that the employees should not be transferred outside the circle/Division the decision to do otherwise would be an exception to the Rule and there must be justifiable reasons for taking recourse to this exception. As already noted by us even the Government of India in its decision has clearly held that transfers of low paid employees to distant place should be avoided and the legitimate claims and expectations of individual

employees should not be ignored. True it may be, that the pay and seniority of the petitioner has been protected in the present case, but one cannot loose sight of the fact that the petitioner has been posted from Gagret in Una to a very remote region of Kaza. The Board has failed to place before us any material to show what are the total number of posts in Kaza and Keylong circles. The Board has also not placed any material to show what are the number of vacancies in the said circles. It was the duty of the Board to have placed before this Court material to show that in case no person was transferred to Kaza work will suffer. There is also no material to show that the Board carried out any exercise to determine in which Circles there are surplus employees available and in which circle there is shortage of persons. Without carrying out such an exercise the Board cannot in view of its own notification dated 19.1.1976 transfer an employee outside the cadre.

Keeping in view the aforesaid discussion, we allow the writ petition, set-aside the order of the learned H.P. State Administrative Tribunal and quash the order of transfer dated 18.8.2003. The writ petition is accordingly disposed of.

CMP No.2012 of 2007:

In view of the disposal of the main matter, no order is required to be passed in this application. Disposed of accordingly.

(Deepak Gupta),
Judge

October 8, 2007.
PV

(V.K. Ahuja),
Judge